

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.10538 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

THAKOREBHAI HARIBHAI PATEL - Petitioner(s)
Versus

DAKSHIN GUJARAT AAHIR SEVA-SAMAJ TRUST & 11

Appearance :

MR ZUBIN F BHARDA for Petitioner(s) : 1,

RULE SERVED BY DS for Respondent(s) : 1 - 2,4 - 12.

MR KIRIT R PATEL for Respondent(s) : 1 - 3,6 - 11.

- for Respondent(s) : 0.0.0

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 02/03/2006

ORAL JUDGMENT

1. This petition, though styled as being under Articles 226/227 of the Constitution of India, in effect is an application under Article 227 of the Constitution of India. The petitioner

challenges order dated 15th January, 2004 made by the trial Court below application Exh.226 in Special Civil Suit No.26 of 1997 rejecting the application moved by the petitioner under Order 1 Rule 10(2) of the Code of Civil Procedure (CPC).

2. The petitioner herein is proposed defendant in Special Civil Suit No.26 of 1997. The said suit has been instituted by respondent No.12 herein (original plaintiff) while respondent Nos.1 to 11 are original defendant Nos.1 to 11. Except for the petitioner, the parties shall be referred to as per their respective description in the suit.
3. The case of the petitioner in nutshell is that the petitioner is brother of defendant No.5 and both of them are sons of deceased Haribhai Kalidas Patel. That the plaintiff and defendant No.5 are lawfully married wife and husband respectively. That deceased Haribhai Kalidas Patel was a co-owner with one Bhulabhai Budhabhai Aahir of land bearing Revenue Survey No.205/2. That vide agreement to sell dated 14th January, 1973 deceased Haribhai and Bhulabhai agreed to sell the lands to one Shree Gopal Mandir Sanskar Kendra (subsequently known as Dakshin Gujarat Aahir Seva Samaj Trust [hereinafter referred to as 'the Trust']). Shri Haribhai

expired in 1978 and, therefore, all the properties belonging to the deceased-Haribhai came to be inherited both by the petitioner and defendant No.5. That the petitioner is residing at Mumbai and hence, in 1981 the petitioner executed a power of attorney in favour of his brother, defendant No.5. It is further the say of the petitioner that the power of attorney in favour of defendant No.5 was in relation to various other parcels of land, except land bearing Revenue Survey Nos.204/1 and 205/2. However, defendant No.5 forged the said power of attorney by interpolating / manipulating the document, and on basis of such forged document executed a sale deed in favour of the plaintiff without the knowledge of the petitioner or the Trust, despite the fact that the said land had already been agreed to be sold in favour of the Trust by deceased-Haribhai. The sale took place on 19th December, 1993.

4. The plaintiff filed Special Civil Suit No.26 of 1997 primarily against the Trust seeking possession of the land in dispute on the basis of the sale deed executed in favour of the plaintiff by defendant No.5 . It is the say of the petitioner that despite the fact that both the plaintiff and defendant No.5, who are wife and husband respectively, were aware of the fact that deceased-Haribhai had put the Trust in possession, to usurp the land the suit was instituted without bringing this fact on

record.

5. To complete the narration of facts it is necessary to record that the Trust filed Special Civil Suit No.35 of 1998 and it is on basis of the said institution of suit by the Trust that the petitioner derived knowledge about the transaction effected by his brother, defendant No.5 in favour of the plaintiff, wife of defendant No.5. That the petitioner, therefore, approached his brother and sister-in-law calling upon them to set the things right and ensure that the wishes of deceased-Haribhai were respected viz. transferring the land in favour of the Trust. However, because the plaintiff and defendant No.5 did not respond, the petitioner moved an application Exh.226 in the pending suit seeking to be impleaded as a party defendant. The said application came to be rejected by the impugned order made by the trial Court on 15th January, 2004.

6. The learned advocate for the petitioner has assailed the impugned order principally on the ground that the petitioner is a vitally affected person, and in case the petitioner is not impleaded in the present proceedings an irreversible situation would arise rendering the suit filed by the petitioner viz. Special Civil Suit No.33 of 2003 infructuous. According to him, the trial Court had committed an error in

reading the provisions of Rule 10(2) of Order 1 of Code of Civil Procedure, 1908 (CPC) and thereby committed an error of jurisdiction in rejecting the application. In support of the submission made he has placed reliance on – (i) Navnitbhai Harmanbhai Patel Vs. Patel Rameshbhai Ambalal & Ors., 1996 (1) G.L.H. 659; and (ii) Patel Chaturbhai Shambhudas & Anr. Vs. State of Gujarat & Anr., AIR 1996 Gujarat 40.

7. The learned advocate for respondent No.12 i.e. the plaintiff has appeared and contested the petition. Though served, there is no contest on behalf of any of the respondents, including defendant No.5, who has chosen not to even put in appearance.

8. The learned advocate on behalf of the plaintiff has emphasized the fact that though the suit was instituted as far back as in the year 1997 the application for impleadment has come only in 2003 and, therefore, the trial Court had rightly rejected the application. He also submitted that the trial Court had rightly stated that the dispute as to whether the power of attorney was misused by way of interpolating or not was an issue which could be taken care of in separate suit filed by the petitioner, and therefore also, there was no need to permit the petitioner to be joined as a party in the present

suit. A further submission was that joining of the petitioner was not necessary for effectual and complete adjudication of the question involved in the suit and the Court could very well adjudicated the issue in absence of the petitioner. He, therefore, urged that in light of the Apex Court decision in the case of Bibi Zubaida Khaton Vs. Nabi Hassan Saheb & Anr. With Amichand Aggarwal Vs. Nabi Hasan, AIR 2004 SC 173, the order made by the trial Court was perfectly in order. Lastly, it was submitted that the jurisdiction available to the High Court under Article 227 is limited as laid down by the Apex Court in case of Mohd. Yunus Vs. Mohd. Mustaqim & Ors., AIR 1984 SC 38, and therefore also, this was not a case where this Court should exercise the powers under Article 227 of the Constitution. He placed reliance on the affidavit-in-reply filed by the plaintiff and read out extensively from the said affidavit in support of the submission made.

9. The facts are not in dispute. The petitioner and defendant No.5 are real brothers. Various properties, including the property under dispute, belong to deceased-father of the petitioner and defendant No.5. Late Shri Haribhai had entered into an agreement to sell in favour of the Trust in relation to the disputed property. The Trust had been put in possession of the property. Only because the Trust was not in

a position to make payment of the entire consideration the execution of final sale deed had been deferred.

10. Deceased-Haribhai passed away before the Trust could arrange for funds and obtain the sale deed executed in its favour, but the petitioner was ready and willing to fulfill the said obligation which arose from the agreement to sell, the petitioner being one of the heirs of deceased-Haribhai. However, defendant No.5, who is the other heir of deceased-Haribhai, instead of the waiting for the Trust to make payment and then parting with the land in favour of the Trust, for the purpose of retaining the land to serve his interest, as the facts reveal, executed a sale deed in favour of his wife, the plaintiff. The petitioner has no grievance in relation to the said sale in so far as it relates to 50% share of the property which devolves on defendant No.5 on death of deceased-Haribhai. His grievance is only qua the balance of 50% share which devolves on him on demise of deceased-Haribhai.

11. In light of the aforesaid factual scenario, it is apparent that unless and until the petitioner gets an opportunity to establish his case that the sale in favour of the plaintiff is bad, the petitioner is likely to loose out the property which has devolved on him and also fail to honour the agreement

entered into by deceased-Haribhai in favour of the Trust. Ultimately, whether the petitioner succeeds or not, is a question which requires to be decided after evidence is led and parties are heard, but without impleading the petitioner in the pending suit viz. Special Civil Suit No.26 of 1997, any decree in favour of the plaintiff would result in a situation whereby both the petitioner and the Trust are divested of the property which has devolved on the petitioner and is required to be parted with in favour of the Trust as per the wishes of deceased-Haribhai. The trial Court ought to have taken this aspect into consideration before rejecting the application Exh.226 made by the petitioner before the trial Court.

12. Order 1 pertains to PARTIES TO SUITS and under Rule 10(2) of the said Order of CPC the legislature has invested the Court with powers to strike out or add parties. The said Rule reads as under:

“10(2) Court may strike out or add parties. --

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as

plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

13. On a plain reading it becomes apparent that the Court is empowered to order striking out the name of any person or order joining of the name of any person at any stage of the proceedings. In other words, there is no limitation. However, the said part of the provisions has always to be construed in a reasonable manner and after taking into consideration the bona fides of the parties, more so in a case where an order for impleading a person as a necessary party is made. The Court has the discretion to make the order either suo motu or on an application made by either party to the proceedings. In exercise of its discretion the Court is empowered to impose such terms and conditions as may appear to the Court to be just. This would include within its sweep any order imposing costs by way of compensation, if necessary, in any appropriate case while granting permission to be impleaded, or imposing a time-bound schedule for completion of pleadings.
14. The latter half of the Rule which deals with the power to order joining of a party lays down the pre-requisite

conditions which would enable the Court to exercise its powers. The first is in case of any person who ought to have been joined and has not been joined as a plaintiff or defendant. In other words, a person who is a necessary party for deciding the lis brought before the Court. The knowledge of a person being a necessary party may be derived by the Court on going through the pleadings or on an application made by either side. The second contingency in which the Court can exercise powers to implead a party is when the Court finds the presence of such person necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The two conditions or contingencies envisaged in the Rule are independent and distinct of each other and in a given case may also co-exist. This is clear from the use of the term 'or' which succeeds words "the name of any person who ought to have been joined, whether as plaintiff or defendant,". After the word "or" it is stated 'whose presence before the Court may be necessary ". Meaning thereby name of a necessary person who ought to have been joined as plaintiff or defendant is an independent requirement than the requirement of the Court in relation to a person whose presence before the Court may be necessary in order to enable the Court to pass a complete order. The language

employed is “..... the name of any person who ought to have been joined, whether as plaintiff or defendant, or, be added.” Thus, in this earlier portion there is almost a compulsion, an emphasis, by use of the phrase “ought to have been joined”. Meaning thereby, a necessary party, without whom the case cannot be correctly decided, i.e. in a just and fair manner.

15. In the case of Navnitbhai Harmanbhai Patel (supra) this Court while dealing with a situation wherein third party had moved an application to be joined as the defendant in suit for partition by one son against father and other brothers, laid down:

“..... The court laid down the law that in a suit relating to property in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject-matter of a litigation. Where the subject matter of a litigation is a declaration as regards status or a legal character the rule of presence of direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position to effectually and completely adjudicate upon the controversy. A clear distinction has been drawn between suits relating to property and those in which the subject-matter of litigation is a

declaration as regards status or legal character. In the former category the rule of present interest as distinguished from the commercial interest is required to be shown before a person may be added as a party.”

The aforesaid observations have been made by this Court on the basis of the Apex Court decision in case of Razia Begum Vs. Anwar Begum, AIR 1958 SC 886.

16. In case of Patel Chaturbhai Shambhudas & Anr. (supra) this Court has laid down that ordinarily a plaintiff should not be compelled to file the suit against a third party but while exercising the powers under sub-rule (2) of Rule 10 of Order 1 of CPC, the Court is obliged to consider all relevant facts and circumstances, and in exceptional cases, it is open to the Court to add a person as defendant even against the opposition of the plaintiff.
17. Applying the aforesaid legal principles to the admitted facts available on record it becomes apparent that if the petitioner is not heard at this stage it would result in an irreversible situation which cannot be set right at a later stage. Not only would the petitioner be deprived of the property which has devolved on the petitioner on the demise of late Shri

Haribhai, but more importantly, the Trust which is in possession of the property in light of the agreement to sell entered into by late Shri Haribhai and Shri Bhulabhai in favour of the Trust would get dispossessed. In so far as this later aspect is concerned, there is no dispute because the suit is filed for possession so far as the Trust is concerned. The petitioner has a direct interest in the property and not a commercial interest.

18. There is one more aspect of the matter which is special to the factual matrix of the present case i.e. sale by defendant No.5-husband in favour of the plaintiff, wife of the defendant No.5. The trial Court ought to have put itself on guard, especially when its attention was invited by the application of the petitioner, regarding the property of the petitioner being sold off by defendant No.5 on the basis of the power of attorney, more so, when the said document itself was being disputed in collateral proceedings. To the contrary, the trial Court accepts the facile explanation of the plaintiff that this is a representative suit, and that the dispute regarding forging of power of attorney can be decided subsequently, without appreciating that this is an issue which goes to the root of the matter. That this is a case where the plaintiff ought to have joined the petitioner. It is also necessary to

record the conduct of defendant No.5 : he has not contested the application made by the petitioner.

19. In these circumstances, reliance on the Apex Court decision in case of Bibi Zubaida Khatoon (supra) on behalf of the plaintiff cannot carry the case of the plaintiff any further in order to support the impugned order. To the contrary the Apex Court stated that a person should ordinarily be joined as a party to enable him to protect his interest during pendency of a litigation. In the present case, the trial Court, therefore, committed an error in exercise of its powers and jurisdiction under Rule 10(2) of Order 1 of CPC in this regard.

20. The exercise of jurisdiction and powers of the High Court under Article 227 of the Constitution is by now well-defined and bears no repetition. There is no doubt, and there can be none as regards the principles laid down by the Apex Court. Suffice it to state that this is a case where the trial Court has failed to exercise its jurisdiction and powers in accordance with law, more particularly in light of the requirement of provisions of Rule 10(2) of Order 1 of CPC.

21. In the result, the order dated 15th January, 2004 below

Exh.226 in Special Civil Suit No.26 of 1997 made by the trial Court rejecting the prayer of the petitioner for being joined as party defendant is quashed and set aside. The trial Court is directed to join the petitioner as a necessary party defendant in Special Civil Suit No.26 of 1997.

22. In light of what is stated hereinbefore, the stay operating against further proceedings in Special Civil Suit No.26 of 1997 is lifted. After the petitioner is impleaded as party defendant the trial Court shall proceed with the suit in accordance with the requirements of law including permitting the petitioner to tender his written statement, which shall be submitted within 03 (three) weeks from the date of being impleaded as a party in the suit.

23. The petition is, accordingly, allowed. Rule made absolute. There shall be no order as to costs. Direct service to the trial Court, plaintiff, i.e. respondent No.12 is permitted.

Sd/-
[D.A. MEHTA, J]

*Bhavesh**